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March 6, 1997

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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Corrected Comments in Closed Captioning and Video Description of Video Programming Notice of Proposed Rulemaking MM Docket No. 95-176

Dear Mr. Caton:

Comments were filed in the referenced proceeding on February 28, 1997 by Outdoor Life Network, Speedvision Network, BET On Jazz, America's Health Network and The Golf Channel. Those comments contained typographical errors. Enclosed are an original and six copies of corrected comments, which have been modified to correct these errors. Please substitute the enclosed comments for those filed on February 28, 1997.

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If you need any additional information, please contact the undersigned.

Respectfully submitted,

Burt A. Braverman

Enclosures

cc: Chairman Hundt
Commissioner Chong
Commissioner Ness
Commissioner Quello

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR - 6 1997

Federal Communications Commission
Office of Secretary

In the Matter of Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility	MM Docket No. 95-176

COMMENTS
of
OUTDOOR LIFE NETWORK
SPEEDVISION NETWORK
THE GOLF CHANNEL
BET ON JAZZ
AMERICA'S HEALTH NETWORK

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February 28, 1997

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COMMENTS OF OUTDOOR LIFE NETWORK, SPEEDVISION NETWORK, THE GOLF CHANNEL, BET ON JAZZ, AND AMERICA'S HEALTH NETWORK

Outdoor Life Network ("Outdoor Life"), Speedvision Network ("Speedvision"), The Golf Channel ("Golf"), BET On Jazz, and America's Health Network ("America's Health") (collectively, "Commenters"), submit these comments in response to the *Notice of Proposed Rulemaking* ("NPRM") released by the Federal Communications Commission ("Commission") on January 17, 1997, in the captioned matter.

I. INTRODUCTION

The Commission's NPRM acknowledges that the actual burden of complying with its proposed closed captioning requirements will be shifted by broadcasters, cable operators and other multichannel video programming distributors ("MVPDs") to program networks, owners and producers. As presently framed, the proposed rules would result in the imposition of these burdensome requirements on all program networks alike, when in fact there are tremendous differences between large, well-established broadcast and cable networks, on the one hand, and new, low-penetrated, start-up networks such as Commenters, on the other, in their ability to shoulder this burden.

The Commission has wholly failed to consider the substantial and disproportionately adverse impact that the enormous costs of captioning -- amounting to millions of dollars annually for 24-hour program services -- will have on start-up networks that have comparatively few subscribers and that operate at substantial losses throughout their early years. Networks such as Golf and Bet On Jazz, for example, with only a few million subscribers, will have to shoulder the same captioning costs as the largest cable and broadcast networks; and yet, they will have neither the subscriber base over which to average such costs, nor the positive cash flow with which to fund them.

To absorb the cost of captioning, some start-up networks will be forced to divert funds from their already-stretched programming budgets, resulting in a reduction in the quality and quantity of the diverse, niche programming that they seek to provide. Others will be compelled simply not to caption at all. Either of these results will further hinder start-up networks in their ability to compete for carriage on channel-locked cable systems, which simply do not have sufficient channel capacity to accommodate all new programmers. Without growth in distribution, the development of these new networks will be stifled and many ultimately will fail.

In these comments, Commenters first describe the highly competitive economic marketplace in which they are seeking to develop their networks and the economic plight of new, start-up programmers such as Commenters who generally operate at a loss until they attain distribution of between 20 and 25 million subscribers. Next, Commenters describe recent regulatory, technological and economic developments that have further hindered Commenters' efforts to gain the distribution on cable systems and other MVPDs that is crucial to their survival. Commenters then explain the unfair and disproportionately adverse impact that the Commission's current closed captioning proposals will have on Commenters and other start-up, niche networks.

Based on that analysis, Commenters present a proposal that would allow the Commission to achieve its statutory mandate while realistically considering the inability of new, start-up niche programming networks to fund the staggering cost of captioning substantial amounts of their programming at a time when they have relatively limited penetration and are operating at significant losses. Specifically, Commenters propose that the Commission classify programming delivered by a low-penetrated national, basic network -- a network that is carried on basic or expanded basic programming tiers of cable and MVPD systems that collectively serve fewer than 20 million subscribers -- as "exempt" programming. Under Commenters' proposal, video programming providers, who are legally responsible for complying with the Commission's proposed minimum closed captioning requirements, would be permitted to exclude channels comprised of such exempt programming from the total number of channels to which the Commission's proposed percentages (25 percent, 50 percent, etc.) are to be applied in determining an MVPD's compliance with the captioning requirements. In so doing, start-up programmers would be temporarily spared both the economic cost of complying with closed captioning, and the market-place disadvantage that would arise if, absent an exemption, they were to fail to meet the proposed closed captioning requirements. This exemption would cease as soon as the low-penetrated network exceeded the 20 million benchmark, and the exemption itself could be reconsidered by the Commission in the event that technological or other factors eliminated, or substantially reduced, the discriminatory impact that the proposed closed captioning requirements would have on low-penetrated networks. This proposal is consistent with Congressional intent, within the scope of power granted to the Commission, limited in scope, in furtherance of the public interest, and sound as a matter of policy and economic reality.

Commenters also address the Commission's proposals regarding individual waivers based on undue burden, and explain why program networks, not just video program providers, should be eligible to receive such waivers.

Finally, Commenters note the serious constitutional implications of the captioning mandates, which discriminate against certain First Amendment speakers -- video programming providers and programming networks -- in violation of the First Amendment and the Equal Protection component of the Fifth Amendment's Due Process Clause.

Commenters support the ultimate goal of closed captioning for persons with hearing disabilities. Indeed, as we explain below, it is in the economic interest of Commenters and other low-penetrated, start-up networks to caption their programming so that they can reach this large and important audience segment. But new networks operate at substantial losses during their early years and their resources during that period are not unlimited. Consequently, they should not be made to comply *now*, or *at the same rate* as larger and far better-resourced networks, with a regulatory requirement so burdensome that it is certain to diminish the quantity and quality of start-up networks' diverse, niche programming, if not to jeopardize those networks' very existence. Sound policy calls for the Commission to harmonize its goals of promoting both captioning for the hearing-disabled and the development of new, diverse viewing sources for the entire public by incorporating into its rules the exemption proposed by Commenters.

II. IDENTIFICATION AND INTEREST OF COMMENTERS

Commenters are five recently-launched, niche programming networks that are struggling to increase subscriber penetration to the levels necessary to become and remain commercially viable. Commenters each presently distribute their programming to between 1.2 and 8 million subscribers, principally over cable television systems, but also over direct broadcast satellite ("DBS") and other MVPD systems. In order to reach break-even and begin making a profit, Commenters generally will have to increase their subscriber penetration to at least 20 million.[1]

As new 24-hour, niche programming networks, Commenters already face substantial barriers to gaining carriage on MVPDs and, thus, increasing their distribution. Yet Commenters' networks feature precisely the diverse, niche programming that Congress and the Commission have sought to encourage in recent years. Moreover, Commenters will offer a total of 8,760 hours of programming in 1997, nearly double the amount delivered by any of the other major broadcast networks. Murvin Aff. at ¶ 8; Williams Aff. at ¶ 9; Hansen Aff. at ¶ 8.

Golf was launched on January 1995, and currently distributes its programming to approximately 8 million subscribers. Murvin Aff. at ¶ 3. Of these, approximately 7.3 million (91 percent) are cable television subscribers and 700,000 (9 percent) are DBS subscribers. *Id.* The network offers new and unique programming tailored to golf enthusiasts. *Id.* at ¶ 7. Golf provides in depth coverage of more than 70 professional golf tournaments from around the world, none of which are covered by other television networks in the United States. *Id.* at ¶ 11. The

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[1]Affidavit of Christopher R. Murvin, Senior Vice President, Legal and Business Affairs, and Secretary, of The Golf Channel, dated February 28, 1997 ("Murvin Aff.") at ¶ 15; Affidavit of Brian Hansen, Vice President, America's Health Network, dated February 28, 1997 ("Hansen Aff.") at ¶ 27; Affidavit of Roger Williams, Executive Vice President and Chief Operating Officer of Outdoor Life Network and Speedvision Network ("Williams Aff.") at ¶ 19; Affidavit of Jefferi K. Lee, President, BET Networks, Inc. ("Lee Aff.") at ¶ 14 (all attached hereto).

network also features instructional programming from top golf teaching professionals, including segments specifically tailored to young golfers, and up-to-the minute golf news and statistics. *Id.* at ¶ 9. Of this programming, approximately 6,400 hours, or 73 percent, will be newly produced, and 2,240 hours, or 27 percent, will be library programming. *Id.* at ¶¶ 9-10. Live programming will comprise approximately 1,160 hours, or 13 percent, of Golf's total programming in 1997. *Id.* at ¶ 12. Less than three percent of Golf's programming in 1997 will be scripted. *Id.* at ¶ 13.

Outdoor Life, which launched in June 1995, distributes its programming to approximately 6 million subscribers. Williams Aff. at ¶ 3. The network is targeted at outdoor enthusiasts and is devoted exclusively to outdoor recreation, conservation, wilderness and adventure. *Id.* at ¶ 10. Its programming, which focuses on outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing, is largely visual. *Id.* at ¶ 10 and ¶ 32. An example of Outdoor Life's highly visual programming includes "Nature's Best," which is produced by National Wildlife Productions and explores the beauty and diversity of the outdoor world through the eyes of the world's premier photographers. *Id.* at ¶ 11. Outdoor Life's extensive coverage of alpine sporting events is also highly visual and accompanied by textual graphics. *Id.* at ¶ 12.

Speedvision launched in January 1996, and currently serves approximately 8 million subscribers. *Id.* at ¶ 3. The network offers never-before-viewed programming targeted at boating, aviation and automobile/motorcycle enthusiasts. *Id.* at ¶ 13. Speedvision provides magazine and lifestyle programs, historical documentaries, current news and information, and events, which comprise the remaining 20 percent of its programming. *Id.* at ¶ 14. The events covered by Speedvision are highly visual and accompanied by textual graphics. *Id.* at ¶ 32. In 1997, Speedvision will provide "Speedvision News," a current news and information program that will contain information that is not available to viewers on any other cable or broadcast network. *Id.* at ¶ 15.

BET On Jazz launched in January 1996, and currently has 1.2 million subscribers. Lee Aff. at ¶ 3. BET On Jazz is the nation's first television programming service dedicated exclusively to jazz music.[2] *Id.* at ¶ 9. Its high-quality, unique programming includes in-studio performances, original music videos produced in the network's own studios, documentaries, concert coverage and celebrity interviews. *Id.* BET On Jazz conducted extensive research concerning subscriber demand for programming focusing on jazz music and determined that the jazz music niche was currently undeserved by existing networks. *Id.* at ¶ 7. Eighty percent of BET On Jazz's programming consists of musical performances, which are largely instrumental. *Id.* at ¶ 8. Approximately 50 percent of the programming currently provided by BET On Jazz is original, *id.* at ¶ 10, and 100 percent is prerecorded. *Id.* at ¶ 18, n. 2.

America's Health launched in March 1996, and currently has 5.7 million subscribers. Hansen Aff. at ¶ 3. Of these, approximately 3.7 million (65 percent) are cable television subscribers, and 2 million (35 percent) are DBS subscribers. *Id.* The network was created to provide easy access to expert health information to all viewers, and in particular, to rural America, which is chronically underserved by the medical community. *Id.* at ¶ 7. Its

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[2]In the words of President Bill Clinton, BET On Jazz "will help broaden the scope and appeal of jazz, further enriching one of America's most important and original offerings to the arts." Lee Aff. at ¶ 7.

programming format consists primarily of live, call-in shows in which viewers are encouraged to "Ask the Doctor" about diverse medical issues ranging from pediatrics, to obstetrics and gynecology, to veterinary medicine, family medicine, family therapy, sports medicine and general medicine. *Id.* at ¶ 9. Seventy-five percent (16 hours per day) of the Network's programming is transmitted live, while the remaining 25 percent (8 hours per day) consists of selected re-broadcasts of those live transmissions during periods of low viewership. *Id.* at ¶ 11.

In order to establish a revenue stream in advance of meeting the minimum distribution threshold required by national advertisers, and to serve a compelling consumer need for reliable and readily available information about health products, America's Health has reserved most of its non-program content for product information and sales segments. *Id.* at ¶ 10. These segments relate to the Network's main informational content, occupy 15 minutes of each hour, and in most cases, are unscripted. *Id.*

These diverse networks, which otherwise compete with each other for carriage, viewership and advertising dollars, have come together here because of a grave concern shared by all -- that the Commission's proposed closed captioning regulations will have a substantial and disproportionately adverse impact on Commenters and other new, low-penetrated, start-up programming networks, and will not only retard these networks' development but, indeed, threaten their ability to survive.

III. THE MULTI-CHANNEL PROGRAMMING MARKETPLACE IS HIGHLY COMPETITIVE AND IS CHARACTERIZED BY SUBSTANTIAL BARRIERS TO ENTRY FOR NEW PROGRAMMING NETWORKS

In recent years, Congress and the Commission have sought to promote the growth of new sources of diverse television programming.[3] That effort has met with great success, as this decade has been marked by a dramatic increase in the number of new programming networks providing diverse, high-quality programming to the viewing public.[4] The most recent data reveals that in 1996 there were over 300 national and regional cable networks competing for carriage, approximately 135 of which are national, basic cable networks.[5] Programming diversity is prevalent throughout the cable television industry today, with programmers competing for valuable channel space by targeting niche areas that to date have been either unserved or undeserved.[6] Diverse, quality programming networks such as Commenters -- the type that

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[3]For example, in promulgating its requirement for Open Video Systems, Congress sought to promote program diversity. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, 4 C.R. 380, 1996 FCC LEXIS 4309 (Aug. 8, 1996) at ¶ 224 (citing Conference Report at 172, 177-78). Similarly, the program access-exclusivity restrictions in the 1992 Cable Act were intended to "promote diversity by providing incentives for cable operators to promote and carry a new and untested programming services." *Cablevision Industries Corp. and Sci-Fi Channel*, CSR 4278-P, 1 CR 673 (released Sept. 7, 1995) at ¶¶ 27-29. The Commission acknowledged the importance of programming diversity when it modified the going-forward rules to ease the burden on establishing new networks. *Sixth Order On Reconsideration (Rate Regulation)*, 10 FCC Rcd. 1226 (1994) at ¶ 22.

[4]Even Vice President Gore, a former critic of the cable television industry, has praised the industry on the diverse programming that it is now providing. AP Online, April 30, 1996. Vice President Gore also complimented the industry on its cutting-edge programming, its contribution to the "dialogue of our representative democracy," and its "forward-looking pursuit of the public interest." *Gore, Turner Predict Tough Future For Cable*, WASHINGTON TELECOM NEWS, May 6, 1996.

[5]National Cable Television Association, CABLE TELEVISION DEVELOPMENTS (Fall 1996) ("NCTA CABLE BOOK") at 6.

[6]*See, e.g.*, Hal Boedeker, *Cable Brings Diversity To Television Channel-Surfing*, PHOENIX GAZETTE, June 26, 1995 ("Cable can be counted on for news, for variety, for risk-taking programming."); Donna Gable, *Disability Channel Widens Boundaries*, USA TODAY, Mar. 29, 1995 ("Cable television—an oasis for niche programming—is about to get even more diverse.").

Congress and the Commission have sought to promote -- have emerged, ready and able to meet the viewing needs of the nation's cable television and other multi-channel subscribers. Yet, new networks face a number of obstacles in their path to commercial viability.

A. New Cable Networks Are Saddled With Enormous Start-Up And Programming Costs

New networks must invest heavily in the production and acquisition of high-quality programming in order to build a network that will be attractive to MVPDs and, ultimately, their subscribers. Launching a new network generally costs approximately $100 to $125 million, or more.[7] Start-up costs include research, facilities, program acquisition, program production, marketing and promotion, personnel, and signal transmission. Golf, for example, has invested over $10 million in a state-of-the-art all-digital production center. Murvin Aff. at ¶ 14. Similarly, BET On Jazz has invested approximately $15 million to create a state-of-the-art television production and distribution facility in which its original programming is produced. Lee Aff. at ¶ 13.

On an ongoing basis, the annual cost of producing and acquiring programming comprises a significant portion of a network's overall budget. Outdoor Life and Speedvision. for example, are spending over $14 million and $16 million per year, respectively. Williams Aff. at ¶ 17. The cost to produce one hour of original programming typically exceeds $15,000, and can be as high as $70,000. Murvin Aff. at ¶ 14; Lee Aff. at ¶ 12; Williams Aff. at ¶ 17. In addition to

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[7]Murvin Aff. at ¶ 14; Williams Aff. at ¶ 16; Hansen Aff. at ¶ 12. *See* Richard Mahler, *Struggling To Hook Up With Viewers*, L.A. TIMES, Apr. 29, 1996 (quoting media analyst David Londoner, with Schroder Wertheim, and MTV founder and now CEO of E! Network, Lee Masters); Richard Katz, *Acquired or Original?: New Networks are Making Different Decisions than Their Predecessors*, MULTICHANNEL NEWS, Jan. 16, 1995, at 8A (estimates of investment in Home and Garden Television, as of January 1995, were approximately $100 million; HGTV has constructed a 45,000-square-foot production facility).

these substantial programming costs, networks must service debt incurred to launch the networks, replace and upgrade facilities, increase personnel, market and promote their services, and cover myriad other expenses incurred in the day-to-day operation of programming networks.

B. New Programming Networks Incur Losses For Many Years

New programming networks almost universally operate at a loss for a number of years, until sufficient distribution, *i.e.*, cash flow, is developed to cover both accumulated losses and current operating expenses. Basic cable networks' cash flow derives primarily from three sources: affiliation fees, advertising revenues, and merchandising -- all of which are directly linked to penetration. Murvin Aff. at ¶ 15; Lee Aff. at ¶ 14; Hansen Aff. at ¶ 15; Williams Aff. at ¶ 19.

Due to the prevailing industry demand that new networks provide aggressive launch packages (consisting of one or more years of free service and other significant launch benefits) to gain carriage on largely channel-locked MSOs[8] and other substantial MVPDs, a new cable network generally has relatively limited affiliation fee revenues during its early years. For example, BET On Jazz has had to enter into agreements with cable systems in which it provides

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[8]Cable systems currently provide service to 63.5 million subscribers, or 88.8 percent of all MVPD subscribers. Cable's closest competitor is DBS, which now serves 4.9 percent of all MVPD subscribers. *Third Annual Competition Report*, CS Docket No. 96-133 (rel. Jan. 2, 1997) at App. F, at 138. Realistically, in order to achieve the minimum number of subscribers necessary for survival, it is essential that new programming networks obtain carriage on cable systems. *Id.* at ¶ 135. But this is a difficult task for new networks, as cable channel capacity is scarce. *See* Paul Farhi, *"Pulling the Plug on Capitol Hill"*, THE WASHINGTON POST, Feb. 13, 1997 at C-1 ("cable systems at full capacity"); COMMUNICATIONS DAILY, Apr. 2, 1996, at 6 ("Main road block to [launch of ESPN 2] is lack of channel capacity on most cable systems . . ."); Tom Watson, *Who's Watching the Food? Has a $60 million investment in a cable network for foodies paid off yet? Television Food Network*, RESTAURANT BUSINESS, Apr. 10, 1995 at 62 ("The market is filled with new niche networks, like the History Channel, the Golf Channel and the Home and Garden Network, all struggling to get their shows on the limited number of channels each cable operator can offer.") Indeed, lack of channel capacity is the number one reason given by cable systems to new programming networks in denying carriage requests. *See* Richard Mahler, *Struggling to Hook up with Viewers*, L.A. TIMES (April 29, 1996). Niche programming networks, with an inherently limited potential audience, have this additional disadvantage as they attempt to obtain carriage.

its programming *free of charge* for one, two or more years in order to gain carriage and increase subscriber penetration and popularity quickly. Lee Aff. at ¶ 14. Other networks have had to offer even longer periods of free service to gain carriage -- as much as *ten years* free service.[9] Indeed, some new networks have had to go so far as to pay to be carried on cable systems, resulting in the diversion of funds previously dedicated to the creation and acquisition of programming.[10] New networks must offer free service not just in their initial year or two of operation, but until they gain sufficient nationwide popularity with viewers to command adequate bargaining leverage to resist the most aggressive demands. Yet even then, after a network has attained 25 million or more subscribers, it must still provide substantial launch incentives consisting of a combination of a period of free service, cash payments to operators for marketing, and other benefits, in order to gain carriage. In short, new networks are able to generate only limited affiliation fees during their early years of operation, and positive cash flow from affiliation fees grows slowly in ensuing years.

Advertising revenues -- the second major source of program network revenues -- are also insignificant for programmers during their early years of operation. This is due to the fact that few major national television advertisers place significant advertising on cable networks until they

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[9]Rich Brown, *Networks hope low rates will buy them a place on expanded lineups*, BROADCASTING & CABLE, Dec. 5, 1994, at 6 (Television Food Network offered free to cable operators for 10 years).

[10]*See* Jim Cooper, *Throwing Money Around,* CABLEVISION, Jan. 27, 1997, at 14 ("Animal Planet is paying for carriage. . . . Networks like Sundance Channel, Independent Film Channel, Outdoor Life, Speedvision and others are all going to have to start paying just to get on systems -- that is, using money that traditionally went into programming."); John M. Higgins, Richard Katz, *Swimming Upstream -- Programmers Caught in TCI's Recovery Net*, MULTICHANNEL NEWS, Nov. 18, 1996, at 1 (TCI charging $14 and $8 per sub to launch Fox News and Animal Planet, respectively).

reach a threshold size -- generally, at least 10 million, and in most cases not until a network reaches at least 15, or as much as 20, million subscribers or more.[11]

Merchandising revenues are also directly linked to a network's distribution. To be able to achieve any significant level of home shopping revenues, a network must reach a broad subscriber group. Just like a retail store, sales volume depends significantly on sustaining a sufficient level of customer "traffic" -- in the case of a network, viewers.

Due to this direct link between revenues and penetration, it is generally impossible for a new, niche cable television network to achieve break-even until its distribution level reaches at least 20 million subscribers.[12] Generally, it takes a new cable network at least five years to reach this level of distribution.[13] During these years, the typical new network will incur enormous cumulative losses. For example, Golf projects that, by the time it hits break-even, it will have spent $135 million to launch and operate its network. Murvin Aff. at ¶ 14. Outdoor Life and Speedvision predict their investment, to reach break-even, will exceed $180 million. Williams Aff. at ¶ 16.

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[11]Murvin Aff. at ¶ 16; Williams Aff. at ¶ 20; Hansen Aff. at ¶ 16; Lee Aff. at ¶ 15. *See also Time Warner Rejects Fox News*, THE ATLANTA JOURNAL AND CONSTITUTION, Sept. 21, 1996 (cable network must have 15 to 20 million subscribers before national advertisers get interested); Jennifer Gangloff, *Over 160 Networks Setting Their Sights On Niche TV Markets*, STAR TRIBUNE, Aug. 4, 1995 ("most national advertisers want 20 to 25 million subscribers").

[12]Murvin Aff. at ¶ 15; Lee Aff. at ¶ 14; Hansen Aff. at ¶ 27; Williams Aff. at ¶ 19; Rich Brown, *Who's watching the food?*, RESTAURANT BUSINESS, Apr. 10, 1995, at 62 (stating the break-even number for Television Food Network to be "about 25 million" subscribers).

[13]Williams Aff. at ¶ 16; Lee Aff. at ¶ 11; Rich Brown, *Who's watching the food?* (in 1995, Court TV, which launched in 1991, expected to break even by 1996).

C. New Programming Networks Face Additional Regulatory, Economic And Technical Obstacles

The channel scarcity that hinders new networks' growth has been exacerbated in recent years by various regulatory developments that have further reduced the number of channels available to new, niche programming networks such as Commenters. For example, federal must-carry and retransmission requirements, as well as local PEG requirements, have consumed a substantial number of cable system channels.[14] Rate regulation has also had the unintended effect of discouraging cable system expansion and the addition of new networks.[15] The Commission's recent leased access order, which reduces rates that cable operators may charge for leased access channels, will result in additional channels becoming unavailable to new programming networks.[16]

This situation is unlikely to improve in the foreseeable future due to a number of related economic and technical factors. The depressed equity values of most cable operators has forced them to scale back or delay planned system rebuilds and expansions of channel capacity.[17] Moreover, the rollout of digital technology, which has been repeatedly postponed by equipment

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[14]*See* 47 U.S.C. §§ 534, 531; Richard Zoglin, *Cable's Big Squeeze*, TIME, June 27, 1994, at 66.

[15]*Sixth Order on Reconsideration (Rate Regulation)* at ¶ 22; Ellis Simon, *Cable's Little White Lie*, ELECTRONIC MEDIA, Dec. 9, 1996 ("going-forward rules are a double edge sword because they limit how much an operator can collect, and therefore, his desire to add channels"); Rich Brown, *New Networks Jockey for Channel Position*, BROADCASTING & CABLE, May 23, 1994 at 42 ("cable rate regulation, limited channel capacity and growing competition for ad dollars have changed the equation.").

[16]*Second Report and Order and Second Order on Reconsideration of the First Report and Order*, CS Docket No. 96-60 (released Feb. 4, 1997).

[17]Elizabeth Lesly and Ronald Grover, *Cable TV: A Crisis Looms*, BUSINESS WEEK, Oct. 14, 1996, at 101.

manufacturers,[18] will now be further delayed because cable operators, suffering poor cash flows and depressed equities, have been forced to put off the deployment of channel-expanding technology.

Consequently, new networks such as Commenters now face an even tougher road than before to commercial viability. Indeed, many new networks have delayed launch, or even failed, because of limited channel availability.[19] Examples of new networks that have failed include: The Language Channel, daVinci Time & Space, The Health Channel, Global Entertainment Television, Living, Music Video Service, New Culture Network, Our Time Television, Popcorn Channel, Product View Point, Quark, Showtime Services, Singlevision, Solutions USA, Success-View Network, Telecompras Shopping Network, Time Traveler, TSM: Television Shopping Mall, WFIT/The Health & Fitness Network, and Women's Sports Network.[20]

[18]Indeed, the development of digital compression technology is realistically at least several years away, and nationwide deployment of the technology may take more than a decade. Rich Brown, *History Has Cable Future: Survey Rates New Networks Most Likely To Be Added to System Line Ups*, BROADCASTING & CABLE, Apr. 22, 1996, at 47.

[19]Richard Katz, *Popcorn: The Latest Indie to Die*, MULTICHANNEL NEWS, Nov. 25, 1996, at 1; Jim McConville, *New Nets: Tough Act to Open; Cable Television Launches Postponed*, CABLEVISION, Nov. 27, 1995 (networks delay launches due to lack of channel availability, tight finances, and uncertainty about pending rate deregulation).

[20]*See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, 1995 FCC LEXIS 7901 ("1995 Competition Report"); National Cable Television Association, CABLE TELEVISION DEVELOPMENTS (Fall 1996) ("NCTA CABLE BOOK"); Richard Katz, *Popcorn: The Latest Indie To Die*, MULTICHANNEL NEWS, Nov. 25, 1996, at 1; Jim McConville, *New Nets: Tough Act To Open; Cable Television Networks Launches Postponed*, CABLEVISION, Nov. 27, 1995; *Rookies And Wanna-bes: The New Cable Networks*, BROADCASTING & CABLE, Apr. 29, 1996, at 64; *Aspiring Networks—The Latest List*, MULTICHANNEL NEWS, Apr. 29, 1996.

D. Mandatory Closed Captioning Will Be A Significant Additional Barrier To The Development of New Programming Networks

Now, on the heels of these developments, the Commission threatens to impose still another burden on low-penetrated, start-up networks such as Commenters -- required closed captioning of all of their new programming and very substantial amounts of their library programming -- regardless of their state of development, distribution, profitability or ability to shoulder such burdensome expenses.

The Commission has requested comment on the effect that its proposed rules will have on "the diversity of available programming." NPRM ¶ 28. Commenters submit that the Commission should reconsider its proposals in order to take account of the tenuous condition of emerging, new programming networks and to ensure that, in its zeal to implement Congress' mandate regarding closed captioning for persons with hearing disabilities, it does not strike the final blow against many of these new networks. Such a move would deprive *all* television viewers, including persons with hearing disabilities, of access to these new programming sources and diminish, not enhance, overall programming diversity.

IV. THE COMMISSION'S PROPOSED CLOSED CAPTIONING REQUIREMENTS WILL HAVE A SUBSTANTIAL AND DISPROPORTIONATELY ADVERSE IMPACT ON NEW PROGRAMMING NETWORKS SUCH AS COMMENTERS

All programming networks will be subjected to substantial costs and burdens under the Commission's closed captioning proposals, even if phased-in over an eight or ten-year period. But the impact of those requirements on new, low-penetrated start-up networks such as Commenters will be disproportionately large and adverse, and will threaten some emerging networks' very existence. Given the limited penetration and financial resources of new programming networks such as Commenters, it is neither equitable nor sensible to impose upon them the *same* captioning requirements, at the very *same rate*, as will be imposed on far larger, more widely distributed broadcast and cable networks.

A. New Programming Networks Such As Commenters Will Bear The Cost Of Captioning

The Commission is proposing to place the legal responsibility for compliance with its closed captioning requirements on "video programming providers," which it defines as "all entities who provide video programming directly to a customer's home, regardless of the distribution technology."[21] NPRM ¶ 28. As proposed by the Commission, video programming providers -- including MVPDs (*e.g.*, cable television and DBS systems) and television broadcasters -- will be required to ensure that new non-exempt programming provided over their distribution systems is closed captioned within eight or ten years. NPRM ¶ 41. Specifically, the Commission suggested that the phase-in schedule should be either eight years, with the intermediate requirements of an additional 25 percent every two years, or ten years, with intermediate requirements of 25 percent after three years, 50 percent after five years, and 75 percent after seven years.[22] NPRM ¶ 41.

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[21]This definition of "video programming provider" may be narrower than Congress intended. *See* H.R. REP. 104-204, 104th Cong., 1st Sess. ("HOUSE REPORT") (1995) ("The term 'provider' contained throughout section 204(d) refers to the specific television station, cable operator, *cable network* or other service that provides programming to the public.") (emphasis added).

[22]The Commission requested comment on whether the phase-in schedule should be eight or ten years in length. NPRM ¶ 41. As an initial matter, Commenters submit that the video programming industry as a whole should be entitled to the longest possible phase-in period, even longer than ten years. This is appropriate given the enormous costs that captioning all new programming will entail. *See Comments of NCTA* (March 15, 1996) at 15 (estimating the incremental cost of captioning all basic programming alone at up to $900 million per year), filed in response to the Commission's *Notice of Inquiry*, FCC 94-484 (rel. Dec. 4, 1995)("NOI"). Moreover, the Commission should also consider the overall economic plight of the cable industry. Mark Robichaux, *Dishing It Out -- Once a Laughingstock, Direct-Broadcast*

Even though the proposed rules would place the legal responsibility for captioning on cable operators and other MVPDs, the Commission has recognized that the actual burden of complying with the captioning requirements will fall on programming networks and other program owners and producers. NPRM ¶ 30 ("we anticipate that our rules will result in video programming providers incorporating such requirements in their contracts with video producers and owners, regardless of which party has the obligation to comply with our rules.") It is on that practical burden -- and its impact on new program networks such as Commenters -- that the Commission must focus.

B. Low-penetrated, Start-up Programming Networks Cannot Shoulder The Substantial Additional Expenses That Would Result From The Commission's Closed Captioning Proposals

1. New Programming

The Commission notes that the estimated cost of captioning pre-recorded programming is up to $2,500 per hour (NPRM ¶ 18), and for live, unscripted programming the cost is estimated to be as much as $1,200 per hour. NPRM ¶ 20. NCTA estimates the cost to reformat programming for rebroadcast or redistribution by a subsequent video provider to be as high as $750 per hour. NCTA Comments at 15.

TV Gives Cable a Scare, WALL STREET JOURNAL, Nov. 7, 1996 ("cable stocks are today the worst-performing category of 118 industry groups in the Standard & Poor's 500"). However, given that both of the Commission's proposed phase-in schedules fail to recognize the disparate impact on low-penetrated programming networks, Commenters present an alternative proposal that takes this critical factor into consideration. *See* Section V, *infra*.

Applying these rates to Commenters' programming lineups is illuminating, if not shocking. America's Health estimates that captioning its programming would cost at least \$800 per hour,[23] which translates to \$12,800 each day to caption its 16 hours of live, unscripted programming. Thus, on an annual basis, the cost to caption America's Health's would be nearly \$4.7 million.[24] Hansen Aff. at ¶ 19. BET on Jazz conservatively estimates that the cost to caption its programming, 100 percent of which is prerecorded, will be \$1,200 per hour. Lee Aff. at ¶ 18. The cost to caption BET On Jazz's programming in 1997 alone would comprise 25 percent of the Network's annual programming budget. *Id.* Outdoor Life and Speedvision estimate that the costs of closed captioning their 1997 programming would be \$1,700 per hour, which translates to \$3 million each per year. This equals 22 percent and 19 percent of the 1997 programming budgets for Outdoor Life and Speedvision, respectively. Williams Aff. at ¶ 23.

Even when reduced to the 25, 50 and 75 percent phase-in quotas that would be required for the first six years of the transition period, these numbers are daunting, and the impact that such expenditures would have on the loss operations of start-up networks such as Commenters is unmistakable. For example, America's Health estimates that the cost of captioning its programming over the proposed eight-year transition period would exceed \$21 million, an amount in excess of America's Health's programming budget for an entire year.[25] Hansen Aff. at ¶ 19.

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[23]Unlike traditional programming that includes approximately 25 percent advertising, America's Health would be required to caption virtually every minute of its programming, including its product information segments. Thus, the rate of \$800 per hour is appropriate, and is, in all likelihood, a conservative estimate.

[24]Computed in the following manner: 365 days/year x \$12,800/day = \$4,672,000.

[25]Computed in the following manner: \$21 M = (\$4.7 M x 1/8)[for Year 1] + (\$4.7 M x 1/4)[for Year 2] + (\$4.7 M x 3/8)[for Year 3] + (\$4.7 M x 1/2)[for Year 4] + (\$4.7 M x 5/8)[for Year 5] + (\$4.7 M x 3/4)[for Year 6] + (\$4.7 M x 7/8)[for Year 7] + (\$4.7 M x 1)[for Year 8]. This analysis conservatively assumes that captioning requirements would be phased-in evenly over eight years.

Outdoor Life and Speedvision estimate that the cost of captioning its programming over the proposed eight-year transition period would exceed \$27 million, an amount in excess of 15 percent of the total investment in the networks before break-even. Williams Aff. at ¶ 23.

New networks such as Commenters will not be able pass along these captioning costs to MVPDs or their subscribers. As discussed above, new networks must give periods of free service in order to obtain carriage during their early years of operation.[26] Under today's market conditions, it is not uncommon for these periods to extend for two, three, five years, or even longer, and even for networks to have to pay MVPDs to gain carriage. Quite simply, if nothing is being charged by a network for its programming, the price cannot be raised to cover the additional costs of closed captioning. And, even if a new network were charging for its service, any attempt to pass through closed captioning costs in the form of higher affiliate fees would significantly thwart its efforts to gain carriage on additional systems and to retain existing affiliates.

Nor can new niche networks require program suppliers, from whom the networks license or purchase much of their programming, to absorb the cost of the captioning. Some program producers are simply unwilling to undertake the responsibility to caption. Others, who will caption, will simply raise the cost of licensing their programming to networks. If their suppliers raise the cost of their programming, new niche networks, such as Commenters, will be forced to pay the increased price or forego carrying the programming altogether. Lee Aff. at ¶ 22; Williams Aff. at ¶ 27; Murvin Aff. at ¶ 23.

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[26]Williams Aff. at ¶ 26; Higgins & Katz, *Swimming Upstream*, MULTICHANNEL NEWS, November 18, 1976 ("Tele-Communications, Inc. president and CEO John Malone plans to lean heavily on programmers to revive the MSO's finances, pursuing both up-front cash and lower license fees from cable networks").